



Docket No. 4010.3002 US1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Mark A. Holland and Nicole Lenihan

Application No.: 10/821,640 Group Art Unit: 1648

Filed: April 9, 2004 Examiner: Nicole Erin Kinsey White

Confirmation No.: 9018

For: BACTERIOPHAGE FOR LYSIS OF *METHYLOBACTERIUM* AND
COMPOSITIONS AND USES THEREOF

REQUEST FOR RECONSIDERATION OF THE PATENT TERM ADJUSTMENT
UNDER 37 CFR 1.705

Dear Sir:

This letter is to request correction of the Patent Term Adjustment under Rule 705. The \$200 fee required by Rule 18(e) is attached herewith.

Pursuant to Rule 703(a), the Office was to grant a term adjustment for the number of days that exceeds 14 months from the filing date of the application to the mail date of the first action on the merits. In this case, the application was filed on April 9, 2004 providing a 14 month date of June 9, 2005. The restriction requirement was mailed on October 21, 2006. The difference, in days, is 469 days. The first action on the merits was mailed, however, on February 1, 2007. The difference in days is 602 days. It is recognized that the USPTO is asserting that a restriction requirement is a first action on the merits. However, this is inconsistent with the long standing interpretation of this phrase as being the first action resulting from examination of the claims.

The USPTO stated that a 30 day delay was due under Rule 703(a)(3). This delay is not disputed.

Under Rule 704(b), Applicants are entitled to the number of days "beginning on the day after the date that is three years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 U.S.C. 371(b) or (f) in an

international application and ending on the date a patent was issued,” less, inter alia, days of overlap with the period of Rule 703(a). The filing date of the application is April 9, 2004. Three years from that date is April 9, 2007. The issue date is June 23, 2009. The number of days is 806. The only days of overlap is the 30 days under Rule 703(a)(3). See *Wyeth v. Dudas* (attached). Thus, total PTO delays equal 1408 days (602+30+806-30).

Rule 704 provides for reduction of the term adjustment under several situations. 704(b) provides for reduction where the Applicant failed to file a reply within 3 months of any action. The PTO has assessed Applicants 174 days of delay for extensions to replying to office actions. This delay is not disputed. The PTO has assessed Applicants a 2 day delay for paying the issue fee. The three month date payment of the issue fee was on Saturday, May 9, 2009. The issue fee was paid on Monday, May 11, 2009. Given the fact that the USPTO was not open on Saturday and the rules allow for the filing of a payment the Monday following the Saturday, Applicants’ disagree that the payment of the fee on Monday lacked diligence within the meaning of Rule 704. The plain language of the rules and the statutes do not address or suggest that the so-called “Monday rule” does not apply to Rule 704. Certainly, it applies to every other deadline calculated by the USPTO. Accordingly, Applicants should not be assessed a 2 day delay for filing the issue fee.

A patent term adjustment of 1,234 days (1408-174) is, therefore, requested. The fee required by Rule 18(e) is attached herewith.

Respectfully submitted,

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